No. 76-231

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, ET AL.,
Petitioners,

v.

WILLIAM T. COLEMAN, JR., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS COMPAGNIE NATIONALE AIR FRANCE AND BRITISH AIRWAYS BOARD IN OPPOSITION

ROGER A. CLARK
GEORGE C. SMITH
Rogers & Wells
1666 K Street, N.W.
Washington, D.C. 20006

Attorneys for Respondent Compagnie Nationale Air France

WILLIAM H. ALLEN
ROBERT M. SUSSMAN
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Respondent British Airways Board

October 1976

INDEX

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-231

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, ET AL.,

Petitioners,

v.

WILLIAM T. COLEMAN, JR., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS COMPAGNIE NATIONALE AIR FRANCE AND BRITISH AIRWAYS BOARD IN OPPOSITION

QUESTIONS PRESENTED

1. Section 611(b)(2) of the Federal Aviation Act, as amended by the Noise Control Act of 1972, would require that, if substantial noise abatement could be achieved by prescribing noise standards and regulations for a supersonic transport aircraft, such standards and regulations must have been prescribed before

an original United States type certificate could be issued for such an aircraft, allowing it to be operated by United States air carriers. The first question presented (petitioners' questions 1 and 2) is whether Section 611, which in terms is silent on the point, also requires that noise standards and regulations for supersonic transport aircraft must be prescribed before foreign air carriers can be allowed to operate the supersonic transport Concorde in and out of United States airports.

2. In deciding that limited Concorde operations by two foreign air carriers should be permitted at two United States airports, the Secretary of Transportation stated that his decision was made solely on the basis of certain record material that he specified. The second question presented (petitioners' question 3) is whether the Court of Appeals erred in taking the Secretary at his word because documents were proffered to it showing that before the incumbent Secretary took office there had been consideration of Concorde policy issues within the Executive Branch.

STATEMENT

On February 4, 1976, the Secretary of Transportation issued his 61-page decision setting forth why he concluded that it is in the public interest of the United States to permit Air France and British Airways to conduct, subject to stringent operating limitations, up to one Concorde flight per day each into Dulles International Airport and up to two Concorde flights per day each into John F. Kennedy Airport for a demonstration period of up to 16 months.[1]

[1] While both carriers have been conducting Concorde operations at Dulles since May 24, 1976, there have been no Concorde operations at JFK as a result of the refusal of the Port Authority of New York and New Jersey to allow Concorde operations at JFK. The constitutionality of the Port Authority's refusal is presently being tested in litigation in the United States District Court for the Southern District of New York, British Airways Board v. Port Authority of New York and New Jersey, No. 76-1276 (S.D.N.Y., filed March 17, 1976).

The Secretary's decision concluded an administrative proceeding that lasted almost a full year and entailed the compilation and publication of comprehensive information on and analysis of all of Concorde's potential environmental impacts. Following the public release of this material in a detailed, four-volume environmental impact statement, the Secretary personally conducted a seven-hour public hearing at which 69 witnesses testified as to whether he should authorize the limited Concorde operations requested by the two foreign carriers.

The Secretary's decision imposed numerous conditions on the provisional operating authorizations for Concorde.[2] Under the Secretary's order, Concorde flights may not be scheduled for landing or takeoff in the United States between 10 p.m. and 7 a.m.; the Federal Aviation Administration was authorized to impose additional noise abatement procedures to minimize the noise impact of the Concorde; and the Secretary reserved the right to revoke the authorizations at any time upon four months' notice or immediately in the event of an emergency.

In addition, the Secretary's order directed the FAA to set up special Concorde noise monitoring systems at Dulles and JFK and to issue public reports on the

[2] THE SECRETARY'S DECISION ON CONCORDE SUPERSONIC TRANSPORT, pp. 3-5 (Feb. 4, 1976) (hereinafter referred to as "Concorde Decis."). If none of the other parties has lodged copies of the Decision with the Court by the completion of briefing, the present respondents will undertake to do so.

results of the monitoring on a monthly basis. These monitoring systems are in place and the required reports have been released each month since the initiation of Concorde service at Dulles.

In his decision, the Secretary fully articulated the multiple considerations that moved him to authorize a tightly-controlled 16-month trial period for Concorde service. The Secretary especially focused on the fact that Concorde's noise impacts could be most fairly assessed on the basis of an actual demonstration period, given the "subjective characteristic of noise response." The Secretary said:

> "The information from this demonstration will enable us to determine whether these original Concordes should be permitted to operate into designated United States airports in accordance with specified operating procedures and restrictions . . . . Although I am deeply concerned about the additional irritation that these few demonstration flights may cause for some individuals within the NEF 30 and 40 contours surrounding JFK and Dulles Airports, I believe that this environmental cost is outweighed by the benefits that will accrue to the American people from the demonstration.' (Concorde Decis. 58.)

The Secretary noted the absence of a regulation of general applicability prescribing noise standards for supersonic aircraft. He said that the lack of such a regulation did not compel a decision either way on the applications before him. (Concorde Decis. 17.) In this regard he pointed out that noise standards for subsonic jet aircraft, 14 C.F.R. Pt. 36, had not been adopted until after more than a decade of experience with such aircraft in commercial operations and that the standards were not made applicable to aircraft built

before the standards were adopted.[3] (*Id.* at 15 n.26.) The Secretary also noted that the current generation of Concordes is not susceptible to substantial noise reduction through modification or redesign. (*Id.* at 16-17, n.28.) In light of these considerations, the Secretary recognized that the imposition upon Concorde of noise standards that technologically could not be satisfied would be perceived abroad as an arbitrary and discriminatory act. (*Id.* at 11-12, 17, 55.) Furthermore, the Secretary said that he had "a statutory obligation" to consider, in making the Concorde decision, "the factors that the Federal Aviation Act lists as important in a decision to promulgate a noise rule" (*id.* at 17); Section 611(d)(4) of the Act requires that, in the prescription of such a rule, there be considered "whether any proposed standard is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft . . . to which it will apply . . ." 49 U.S.C. § 1431(d)(4).

Along with its extensive consideration of noise and other environmental factors, the decision weighed additional important factors that the Secretary was required to take into account by virtue of his office and pursuant to statutory requirements. Among these were considerations of aviation and transportation technology, international relations, and United States treaty obligations. Further, as the Secretary pointed out in his decision, British and French officials affirmed in testimony during the January 5, 1976, Concorde hearing that their governments made no claim of any

---

[3] As a result of this limitation, coupled with the slow pace of replacement of older commercial subsonic jets, roughly *80%* of the subsonic jets in service in the United States today are, like Concorde, not subject to the FAA's noise regulation, 14 C.F.R. Pt. 36.

outstanding United States commitment respecting authorizations for Concorde service by the two foreign carriers. (Concorde Decis. 2.)

The Secretary made clear that he based his decision solely on certain materials of record that he specified.

> "Today's decision is based entirely on my review of the EIS, on the January 5 hearing, and on my subsequent review of the transcript and other written materials submitted for the record." (*Id.*)

Petitions for review of the Secretary's decision were filed, briefed and argued by the petitioners and others in the court below. These respondents, the interested foreign carriers Air France and British Airways, intervened in support of the decision. In a *per curiam* order issued on May 19, 1976, the day it heard argument, the Court of Appeals (Wright, McGowan and Robb, JJ.) affirmed the Secretary's decision. The court said:

> "This court is in agreement with the Secretary that in the circumstances of this case his order for such a trial period is within his authority and competence, and is not arbitrary or capricious or otherwise in violation of law." (Pet. 3a.)

REASONS FOR DENYING THE WRIT

Neither question presented by petitioners satisfies the criteria of Rule 19 of the Rules of this Court. The first (which petitioners for some reason divide into their questions 1 and 2) is a simple issue of statutory construction that is most unlikely to recur. There is no conflict among the circuits, and on the merits the issue is not even close. The court below was clearly correct in concluding that, in respect of the issue that

petitioners raise here and in all other respects, the Secretary's order was "within his authority and competence. . . ."

The other question was not even presented to the court below until oral argument, although the documents that are said to give rise to the question were appended to reply briefs of several petitioners below, including the petitioners here, to bolster other arguments. Stripped of petitioners' rhetoric, the question is whether the existence of documents disclosed by the Secretary himself, which indicated a lively interest in broad issues of Concorde policy within the Executive Branch at some time before the incumbent Secretary took office, is inconsistent with the Secretary's representation that his decision was based on a record that did not include such documents. Of course, there is no inconsistency. There is certainly nothing in the Court of Appeals' implicit rejection of the last-minute desperation argument based on the documents to warrant further review by this Court.

1. Petitioners invite the Court to review the decision below so that it may write into Section 611 of the Federal Aviation Act as amended by the Noise Control Act of 1972, 49 U.S.C. § 1431, a requirement that Congress eschewed. Petitioners' argument is that Section 611 prohibited the Secretary from amending the operations specifications of the two respondent foreign air carriers to allow specified Concorde service until the FAA had first adopted noise regulations for supersonic aircraft.

Such a requirement is not contained in Section 611 or in any other provision of law. Section 611(b)(2) *does* identify the one specific licensing action that in many cases at least must be preceded by the adoption

of noise regulations applicable to the aircraft licensed: issuance of an original United States type certificate under Section 603(a) of the Federal Aviation Act, 49 U.S.C. § 1423(a).[4] Such a certificate would be required if United States domestic carriers sought to engage in Concorde operations; in that event, the certificate could not be issued without prior adoption of SST noise regulations or, alternatively, a finding that substantial noise abatement could not be achieved for Concorde through valid noise regulations.

The reason why this condition precedent has been specified with respect to issuance of a United States type certificate is readily apparent. Once an aircraft has been awarded such a certificate, it can be expected to be placed in service to airports throughout the country by the major United States carriers. The issuance of a United States type certificate therefore has a broad impact on the overall aircraft noise situation in the United States.

The Secretary's decision had nothing to do with the issuance of an original United States type certificate for Concorde. It merely directed temporary amendments of the operations specifications of two foreign carriers, affecting operations at only two United States airports. Congress did not make noise standards a prerequisite to that kind of licensing action.

Because Section 611 clearly does not in terms contain the requirements that petitioners would write into it, they resort to selected snatches of legislative history to supply what is lacking in the text. However, Section

[4] Even the issuance of a type certificate does not require the prior adoption of noise regulations in the case of an aircraft for which substantial noise abatement cannot be achieved by prescribing such regulations. § 611(b)(2), 49 U.S.C. § 1431(b)(2).

611 unambiguously identifies the sole licensing action to which the promulgation of noise standards is a prerequisite. When there is no ambiguity, resort to legislative history is dubious at best. Regardless of that, the bits of legislative history that petitioners invoke are clearly insufficient to justify the result they seek.

Indeed, the only arguably pertinent legislative history cited by petitioners is Senator Tunney's remark that it was his "expectation" and "the Senate's clear intention" that supersonic noise standards be promulgated before any supersonics could enter commercial service. (Pet. 8.) What the Senator's quoted remarks and the petitioners' brief fail to disclose is that the remarks were made after the House had declined to accept a Senate-cleared amendment to the noise control legislation that, if enacted, would have put into effect the very "expectation" and "intention" referred to. In fact, that amendment would have applied the FAA's existing subsonic noise standards to supersonic aircraft without any further inquiry or study.[5] Senator Tun-

[5] That amendment, proposed by Senator Cranston, would have provided as follows:

> "No civil aircraft capable of flying at supersonic speed shall land at any place under the jurisdiction of the United States unless in compliance with the noise levels prescribed for subsonic aircraft by the Administrator of the Federal Aviation Administration and in effect on September 1, 1972." 118 Cong. Rec. 35879 (1972).

Even the Senate's passage of that amendment was apparently based upon the fundamental misconception that it was technically feasible for Concorde to be adjusted to meet the Part 36 noise regulations. See 118 Cong. Rec. 18001 (1972) (Remarks of Sen. Cranston.) The Cranston amendment was neither included in the version of the bill approved by the House nor finally enacted. It was in that context, in an apparent effort to salvage by legislative history what could not be enacted into law, that the remarks of Senator Tunney quoted by petitioners were made. See 118 Cong. Rec. 37318 (1972) (Remarks of Sen. Tunney).

ney was obviously trying to salvage what he could from a disappointing legislative defeat.

The personal expectations of a Senator and even the "clear intention" of one house of Congress are not law. Statements of such expectations and intentions may illuminate ambiguous provisions of statutes that are the law. In this case, however, the language of Section 611 is specific and unambiguous in identifying the one type of licensing action which may require prior promulgation of a noise standard. That type of action was simply not involved in the Secretary's decision.

2. Petitioners assert in substance that the Secretary's careful opinion and the comprehensive administrative record underlying it are merely a ruse—that "the decision to admit the Concorde SST into the United States was prompted by factors outside the record and was made principally by governmental officials other than the Secretary." (Pet. 10.) This audacious assertion comes in the face of Secretary Coleman's express assurance that the decision was his own and was based entirely on his review of the administrative record. In its invocation of communications from then-President Nixon to the President of France and the Prime Minister of the United Kingdom, it ignores the Secretary's statement that representatives of the French and British Governments "each testified that there was no express or implied commitment that the United States was obliged to permit the Concorde to land in the United States, and no one has brought to my attention any such express or implied agreement." (Concorde Decis. 2.)

The support petitioners offer for their grave allegations of bad faith on the part of a Cabinet officer and

two foreign governments is embarrassingly thin. Appended to their petition are six documents (Pet. 17a-33a) that were not included in the administrative record, do not mention Secretary Coleman, were written three years before he became Secretary and bear on matters relevant only tangentially, if at all, to the decision to permit the Concorde demonstration. Of the six documents that petitioners apparently think make their best case, only four were first disclosed after the Secretary's decision. (See Pet. 10.) The other two—the Nixon letters to the French President and the British Prime Minister—had been public for weeks. Presumably, these letters were among the very factors that prompted the Secretary to ask the British and French officials who appeared before him whether they claimed that any commitment had been made by the United States government to admit the Concorde to United States airports.

In any event, nothing in the documents casts the slightest shadow on the independence of the Secretary's decision and, certainly, nothing in them justifies the extraordinary step of intruding into the thought processes of an official who has already explained the reasons for his action forthrightly and in painstaking detail.

Petitioners' documents date from a two-month period in late 1972 and early 1973 and relate to the Nixon Administration's attempt to formulate a response to the request of the British and French Governments for equitable treatment of the Concorde.

The documents reveal an effort—much like Secretary Coleman's own decision—to chart a delicate course that would at once avoid unnecessarily antagonizing

America's allies while going forward with the implementation of America's domestic environmental and aviation policies.

Even if petitioners' documents reflected something more than normal interagency coordination to formulate diplomatic policy on a sensitive issue—and even a casual reading will show that they do not—the fact remains that they relate to regulatory actions that were not only never taken but are today of merely historical interest. Two proposed FAA programs were dealt with in the documents: a so-called "fleet-noise rule," under which an average noise level would be established for the aircraft fleets of United States carriers, and a so-called "FAR 36 rule," under which supersonic aircraft operated by domestic carriers would be required to meet existing noise standards for subsonic aircraft. The "fleet-noise rule" was never adopted because it was unworkably complicated. The "FAR 36 rule" was rejected because intervening events—notably the domestic carriers' loss of interest in the SST—made it unnecessary. But, even more important, neither of these abortive regulations could have affected the authority of Air France and British Airways to operate their own Concordes to the United States. By their terms, they were limited to type certification, a requirement of the Federal Aviation Act that plainly affects only the aircraft of domestic air carriers.[6] As a result, their sole relevance to the Concorde could only be in the context of possible Concorde purchases by domestic airlines. This point is emphasized in one of petition-

[6] By virtue of § 501(b)(1) of the Federal Aviation Act, 49 U.S.C. § 1401(b)(1), the type certification procedures of § 603, 49 U.S.C. § 1423, apply "only to aircraft owned by a citizen of the United States."

ers' documents, Mr. Flanagan's memorandum of November 17, 1972, which states that each rule "would affect only U.S. purchasers of the Concorde and would not prevent its operation in U.S. airspace by foreign operators." (Pet. 23a-24a.)

The issue for the Secretary was the entirely different one of whether to permit overseas Concorde flights by British Airways and Air France to land at Dulles and Kennedy airports. As a result, there is no reason why he should have taken into account the internal documents adduced by petitioners, even if he were acquainted with them. The documents do not mention Secretary Coleman and contain no ground for the slightest inference of any impropriety on his part. They do not even hint at a reason for not accepting at face value his designation of the materials he considered in making his decision and his disclaimer of having relied on anything else.

Because the idea that the Secretary's decision was dictated by others is sheer fantasy, there is no justification for making what petitioners describe as a "plenary inquiry into the underlying facts." (Pet. 13.) This Court's seminal decision in *United States* v. *Morgan*, 313 U.S. 409 (1941), makes it clear that the validity of agency action must be judged solely by the agency's formal findings and reasons and not by an after-the-fact attempt to reconstruct the mental processes of the decision-maker. In *Morgan*, an order of the Secretary of Agriculture was attacked on the ground that the Secretary had "prejudged" the issues before him. This charge of prejudgment was based on a letter the Secretary wrote to the New York Times criticizing an earlier decision of this Court reversing a previous department order. Much as petitioners

would have this Court direct, the District Court authorized the petitioners to take the Secretary's deposition, and he "was questioned at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record, and his consultation with subordinates." 313 U.S. at 422. Speaking through Mr. Justice Frankfurter, the Court condemned in the strongest terms this wasteful and demeaning invasion of the Secretary's decision-making processes:

> "But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary 'has a quality resembling that of a judicial proceeding.' *Morgan* v. *United States*, 298 U.S. 468, 480. Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that 'it was not the function of the court to probe the mental processes of the Secretary.' 304 U.S. 1, 19. Just as a judge cannot be subjected to such a scrutiny, . . . so the integrity of the administrative process must be equally respected." *Id.*

To engage in a similar interrogation of Secretary Coleman would be equally unjustified and even more unseemly.[7] The Secretary has explained his action in an opinion that is a model of reasoned and candid agency decision-making. He has explicitly disavowed

[7] The Court's decision in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1972), intimates that testimony from administrative officials who participated in the decision, while "usually to be avoided," may be proper upon a "strong showing of bad faith or improper behavior." Needless to say, petitioners have not come close to making this strong showing. Cf. Bank of Commerce of Laredo v. City National Bank of Laredo, 484 F.2d 284, 287-288 (5th Cir. 1973).

the existence of any hidden Administration commitments that could prejudge the issues before him, and representatives of the French and British governments have offered similar denials. The evidence produced by petitioners does not even remotely suggest the contrary. Like any other agency official who has taken the trouble to explain his actions, Secretary Coleman should therefore be judged by what he has said and by the hearing transcripts, studies and many other documents that he has identified as the underlying basis for his decision. It is a tribute to the quality of the Secretary's decision that the sitting panel of the court below, treated to the same scandalous accusations of bad faith that are set forth in the petition, sustained the decision summarily on the day the argument was heard.

CONCLUSION

The petition should be denied.

Respectfully submitted,

ROGER A. CLARK
GEORGE C. SMITH
Rogers & Wells
1666 K Street, N.W.
Washington, D.C. 20006

Attorneys for Respondent Compagnie Nationale Air France

ROBERT SUSSMAN
WILLIAM H. ALLEN
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Respondent British Airways Board

October 1976


opposition

No. 76-231

In the Supreme Court of the United States

OCTOBER TERM, 1976

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, AND THE COUNTY OF NASSAU, NEW YORK, PETITIONERS

v.

WILLIAM T. COLEMAN, JR., SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

PETER R. TAFT,
Assistant Attorney General,

EDMUND B. CLARK,
PETER R. STEENLAND, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

DONALD BLISS,
Deputy General Counsel,

ROBERT B. DONIN,
Attorney,
Department of Transportation,
Washington, D.C. 20590.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-231

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, AND THE COUNTY OF NASSAU, NEW YORK, PETITIONERS

v.

WILLIAM T. COLEMAN, JR., SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ORDER BELOW

The order of the court of appeals (Pet. App. 1a-4a), affirming without opinion the decision of the Secretary of Transportation,[1] has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1976. The petition for a writ of certiorari was filed on August 16, 1976. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 1486(f).

---

[1]For the convenience of the Court, we have lodged copies of the Secretary's opinion with the Clerk.

QUESTIONS PRESENTED

1. Whether Section 611(b)(1) of the Federal Aviation Act prohibits the Secretary of Transportation from granting temporary and conditional approval for foreign air carriers to operate the Concorde aircraft in the United States before the Federal Aviation Administration has promulgated general noise standards for the operation of supersonic aircraft.

2. Whether the court of appeals erroneously declined to remand this case to the district court to require testimony from the Secretary of Transportation concerning petitioners' charges that his decision was not, as he stated, based solely on the record in this case.

STATUTE INVOLVED

Section 611 of the Federal Aviation Act of 1958, as added, 82 Stat. 395, and amended, 86 Stat 1239, 49 U.S.C. (Supp. V) 1431, is reproduced at Pet. App. 5a-10a.

STATEMENT

1. *The Secretary's decision.* On February 4, 1976, the Secretary of Transportation, William T. Coleman, Jr., ordered the Federal Aviation Administrator to permit British Airways and Air France to conduct scheduled commercial flights from London and Paris to New York and Washington using the Concorde Supersonic Transport aircraft. The order limited permission to a test period of not longer than 16 months and imposed a number of terms and conditions upon the two air carriers, including the restriction that neither carrier operate more than two supersonic flights per day at Kennedy Airport

and one flight per day at Dulles Airport.[2] The Secretary declined to give permanent authorization for Concorde service, determining that a demonstration period was necessary to measure both the environmental impact and the commercial acceptance of the Concorde. Secretary Coleman directed that monitoring systems be installed at both United States airports to measure noise and emission levels of Concorde operations and that additional data on 12 months of Concorde flights be collected for analysis during the final four months of the demonstration period.

The Secretary's decision to admit the Concorde for a limited test period was made in response to applications filed with the Federal Aviation Administration by British Airways and Air France, seeking permanent amendment of their operations specifications to allow commercial supersonic service.[3] Recognizing that approval of the requests might be construed as "major Federal action significantly affecting the quality of the human environment," within the meaning of Section 102(2)(C) of the

---

[2]Other limitations included, *inter alia*, a restriction preventing scheduled Concorde flights from arriving or departing before 7 A.M. or after 10 P.M., a prohibition against supersonic flights over the United States, a requirement that an entirely new Environmental Impact Statement be prepared prior to authorization of a greater number of flights, and a provision permitting revocation of approval for these flights upon four months' notice to the air carriers or immediately if such action be deemed in the interest of the health, safety and welfare of the American people.

[3]According to Part 129 of the Federal Aviation Regulations (14 C.F.R. Part 129), "operations specifications" must set forth the type of aircraft to be flown, the airports to be served, and the routes and flight procedures to be followed. An application for operations specifications or for amendments thereto must be approved before a foreign air carrier may begin commercial air service to and from the United States.

National Environmental Policy Act of 1969, 83 Stat. 853, 42 U.S.C. 4332(2)(C), the FAA began to prepare an Environmental Impact Statement in early 1975. Public hearings were held, and the Environmental Impact Statment was released in final form on November 13, 1975. On that date, the Secretary announced that he would defer action on the airlines' applications until after another public hearing on January 5, 1976. The Secretary himself chaired that hearing, which resulted in more than seven hours of testimony by proponents and opponents of the Concorde and questioning by the Secretary. Further written submissions were invited and made a part of the administrative record. The Impact Statement was then revised to reflect the information, comments and responses elicited at that hearing.

On February 4, 1976, after a thorough review of the entire record, the Secretary issued a 61-page opinion, setting forth in detail the reasons for his decision to deny permanent amendment of the operations specifications and to allow instead the 16-month demonstration period.

The opinion reviewed in detail the possible effects of Concorde operation on air quality, conservation of energy resources, potential depletion of ozone density in the stratosphere, and noise impact in the environs of the two airports involved.[4] Although the Secretary recognized that some adverse effects were likely, he found those effects to be outweighed, at least over the short term, by the

[4]The Secretary did not discuss at length the question of safety, accepting instead the conclusion of the FAA that the aircraft could be operated safely within the United States air traffic control system.

technological benefits of the Concorde and its significance with regard to international relations.

The Secretary also concluded that the absence of supersonic aircraft noise standards promulgated pursuant to Section 611 of the Federal Aviation Act did not prevent a decision whether Concorde operations should be allowed, rejecting the argument that issuance of such noise standards must precede amendment of the carriers' operations specifications. The Secretary noted that the FAA was following precisely the procedure prescribed by Section 611 in developing such noise standards and that the experience and data gained from the limited Concorde demonstration would be very useful in the ultimate development of standards, consistent with the criteria set forth in Section 611.

2. *The proceedings below.* Two weeks before the Secretary issued his decision, the Boards of Supervisors of Fairfax and Loudoun Counties, Virginia, filed an action in the United States District Court for the District of Columbia against Secretary Coleman and Administrator McLucas of the FAA, seeking to prohibit authorization of Concorde operations in the United States before general noise standards for supersonic aircraft had been promulgated by the FAA.[5] The Boards of Supervisors also sought a writ of mandamus to compel promulgation of those standards. On March 12, 1976, the district court issued an order denying plaintiffs' motion for a preliminary injunction and granting the defendants' motion to dismiss all of the case except the claim for mandamus, on the ground that jurisdiction to review the Secretary's order rested exclusively with

[5]Nassau County, New York, was added as a plaintiff after the Secretary's decision.

the court of appeals under Section 1006 of the Federal Aviation Act of 1958, 72 Stat. 795, as amended, 49 U.S.C. 1486. On March 18, 1976, the plaintiffs filed, *inter alia*, a notice of appeal and a motion for summary reversal of the district court decision, as well as a petition for review in the court of appeals.

In the interim, petitions for review of the Secretary's order were filed in the court of appeals by the Environmental Defense Fund and the State of New York. The various matters then were consolidated for purposes of argument and decision. Because the airlines had announced their intention to commence Concorde service to Washington on May 24, 1976, the court directed expedited briefing and consideration of the cases.[6] Oral argument was held on the morning of May 19, 1976. That evening the court of appeals issued a unanimous order—without opinion—affirming the order of the Secretary. On May 21, 1976, the Boards of Supervisors of Fairfax and Loudoun Counties, Virginia, and Nassau County, New York, filed an application for stay of mandate with the Chief Justice, who denied it the following day.

ARGUMENT

The decision by the court of appeals is correct and no further review is warranted.

1. Petitioners contend (Pet. 5-9) that the Secretary is prohibited by Section 611(b)(1) of the Federal Aviation Act, as amended, 49 U.S.C. (Supp. V) 1431(b)(1),

[6]On March 11, 1976, the Port Authority of New York and New Jersey adopted a resolution to ban Concorde operations at Kennedy Airport pending study of six months of Concorde operations at Dulles Airport. An action by British Airways and Air France to enjoin enforcement of that resolution is now pending in the United States District Court for the Southern District of New York.

from giving British Airways and Air France even limited approval for the conduct of transatlantic supersonic flights before the FAA has developed general noise standards applicable to supersonic aircraft. The statute contains no such prohibition. Section 611(b)(1), as amended by the Noise Control Act of 1972, 86 Stat. 1239, commits the promulgation of noise standards for supersonic transports to the reasonable discretion of the FAA, directing the agency to "prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom." Moreover, the FAA must consider, among other factors, whether any proposed standard or regulation is "economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance or certificate to which it will apply." Section 611(d)(4). The statute does not impose inflexible time limits[7] nor does it bar authorization of supersonic flights while standards are being developed. This statutory framework is in direct contrast to Section 611(b)(2), which explicitly prohibits

[7]There is no basis for petitioners' allegations (Pet. 7) of bad faith or undue delay by the FAA. The agency stands in full compliance with the timetable prescribed by Congress in Section 611(c) for the promulgation of those standards. On February 27, 1975, the Environmental Protection Agency submitted proposed supersonic aircraft noise standards to the FAA. As required, the FAA published this proposal as a notice of proposed rulemaking within 30 days thereafter. Timely public hearings were held, and the FAA began to draft an environmental impact statement on the proposed standards. The task was in progress at the time of the January 5, 1976, public hearing on Concorde service, but shortly thereafter, EPA submitted a new, substantially different SST noise proposal. The FAA once more published the proposal and again held a timely hearing. Work on the revised impact statement, which will reflect this latest EPA submission, is now underway. In the interim, the experience of limited Concorde service will be considered in the establishment of those standards.

the FAA from issuing an "original type certificate" under 49 U.S.C. 1423(a) for aircraft "for which substantial noise abatement can be achieved" unless the noise standards applicable to that aircraft first have been prescribed. That requirement, which applies only to aircraft manufactured in this country or operated by United States flag carriers, is currently inapplicable to the Concorde.

The bulk of the legislative history on which petitioners rely involves unsuccessful attempts by members of Congress to require that implementation of noise standards precede supersonic aircraft operation. The remarks of Senator Tunney (Pet. 8), for example, address a provision inserted in the Senate version of the Noise Control Act of 1972 that would have required what petitioners urge. That provision was neither included in the version approved by the House nor enacted into law. Congress more recently has again declined to enact such a requirement. On March 25, 1976, the Senate rejected a proposal by Senator Bumpers to bar operation of Concordes pending the application to supersonics of the general noise regulations presently applicable to subsonics. 122 Cong. Rec. S4338-S4342 (daily ed., March 25, 1976).

The decision of the Secretary will permit the FAA to gather a substantial body of information regarding the environmental and technological characteristics of Concorde operation for consideration in the promulgation of a general supersonic noise standard.[8] The Secretary ex-

[8]The Secretary's determination follows the pattern adopted for subsonic aircraft noise standards. The FAA promulgated those standards in 1969 as Part 36 of the Federal Aviation Regulations (14 C.F.R. Part 36), after more than a decade of jet aircraft operations during which new technologies for noise suppression had been developed. These standards, originally applicable only to aircraft types certificated after 1969, were applied in 1974 to individual aircraft of a type certificated before 1969 but not flown before 1974. Thus, promulgation of the original rule occurred after the development of technology to make new aircraft quieter; the rule was expanded in scope when that technology could be applied to new models of earlier generation aircraft.

Because replacement of older aircraft is relatively slow, more than 80 percent of the subsonic planes now in service in the United States are not required to, and do not, satisfy the F.A.R. Part 36 standards. A rule that would completely bar operation of the Concorde would have been a substantial departure from this historical pattern.

pressly recognized that this would be one benefit of a decision to authorize a demonstration of Concorde flights not to exceed 16 months (Secretary's decision, p. 58). The modest delay needed to gain such experience "may well speed achievement of the goal of pollution abatement by obviating the need for time-consuming corrective measures at a later date." *Natural Resources Defense Council, Inc.* v. *Train*, 510 F. 2d 692, 712 (C.A. D.C.).

2. Petitioners claim (Pet. 13) that "the integrity of the scope of judicial inquiry" requires a remand to secure testimony by the Secretary further explaining his action.[9]

The Secretary's comprehensive opinion explained all aspects of his decision and stated (Secretary's decision, p. 2):

> Today's decision is based entirely on my review of the EIS, on the January 5 hearing, and on my subsequent review of the transcript and other written

[9]Petitioners apparently desire a remand to the district court (Pet. 13). Since review of the Secretary's decision is entrusted to the court of appeals, 49 U.S.C. 1486(a), the basis for such a remand is not apparent.

materials submitted for the record. At the public hearings, the United Kingdom's Minister of State for the Department of Industry and France's Director of Air Transport, Civil Aviation Department, each testified that there was no expressed or implied commitment that the United States was obliged to permit the Concorde to land in the United States, and no one has brought to my attention any such expressed or implied agreement.

Petitioners rely on two letters of January 19, 1973, written by former President Nixon to former President Pompidou of France and former Prime Minister Heath of Great Britain, as well as the other internal government memoranda reprinted by petitioners (Pet. App. 17a-34a), to suggest that the Secretary's decision was based on matters outside the record. Those materials show only that the proposed Concorde flights were an issue of political sensitivity. Nothing in any of the proffered materials suggests that Secretary Coleman acted in "bad faith" or engaged in "improper behavior." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420. Further proceedings are not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER R. TAFT,
Assistant Attorney General.

EDMUND B. CLARK,
PETER R. STEENLAND, JR.,
Attorneys.

DONALD BLISS,
Deputy General Counsel,

ROBERT B. DONIN,
Attorney,
Department of Transportation.

NOVEMBER 1976.

DOJ-1976-11